petition has had that effect.

In all the circumstances of this case the just solution to the problem is for a new date to be allotted for the hearing of the petition.

I hereby exercise the powers given to me by section 221(2) of the Companies Act and direct that this petition be heard at 2.30 p.m. on November 19, 1984. I dispense with the need to advertise the new hearing date whether in newspapers or the gazette. The Court will send notices of the date of the hearing to the parties who have given notice of intention to appear at the hearing of the petition.

The costs of the preliminary objection shall be costs in the cause.

*Order accordingly.*

Solicitors : *Azman, Davidson & Co.; Ng Ek Teong & Partners.*

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## PUBLIC PROSECUTOR v. JAMALI BIN ADNAN

**[O.Cr.J. (Shankar J.) December 2, 1984]**
**[Johor Bahru – Criminal Trial No. 3 of 1984]**

*Criminal law and Procedure – Control of firearms and ammunition without lawful authority – Caution statement – Information leading to discovery of exhibits – Proof beyond reasonable doubt – Evidence of defence improbable or incredible – Internal Security Act, 1960, ss.57(1)(a) & (b) – Criminal Procedure Code, (F.M.S. Cap. 6) s.113 – Evidence Act 1950, s.27.*

*Evidence – Control of firearms and ammunition without lawful authority – Caution statement – Information leading to discovery of exhibits.*

The accused was tried on 2 charges under the Internal Security Act, 1960. The 1st charge under section 57(1)(a) related to 2 revolvers under his control without lawful authority. The second charge under section 57(1)(b) related to 39 rounds of ammunition under his control without lawful authority. These offences are punishable with death. The main prosecution witness was PW2, a senior police officer, who, acting on information received, formed a raiding party on October 18, as a result of which the accused was arrested. In the course of interview with the accused, the police received certain information leading to the discovery of the subject matter of the 2 charges. On October 20, 1981, PW5, another police officer, recorded a certain statement from the accused, who challenged its admissibility. The crux of the charges was whether the accused was in control of the firearms and ammunition at the material time.

The crux of the defence was that he met a Thai friend who told him that he (Thai friend) had kept some things near a durian tree. The accused did not know what the things were. He was adamant that he had never seen these firearms and ammunition before. He insisted that he never at any time said that the guns and ammunition were his.

**Held:** (1) the statement had been voluntarily made and it was admissible in evidence;

(2) the evidence led by the prosecution, quite apart from any specific statement made by the accused either at the interview, or at the scene, or in his caution statement, proved beyond all reasonable doubt that the guns and ammunition were under the control of the accused as charged;

(3) the accused's evidence as to his alleged meeting with his Thai friend is improbable in the extreme. In all the circumstances, the accused's evidence that he did not know what his Thai friend had kept in the durian plantation and how he had kept it there is quite incredible. There was sufficient independent evidence for the court to find that the prosecution has proved beyond reasonable doubt that it was the accused who buried the revolvers and ammunition and it was he who led the police and assisted them to recover the same. On the evidence, the accused alone had the arms and ammunition under his control;

(4) the accused was found guilty as charged on both counts and was convicted accordingly.

[*Editorial Note:* The accused's appeal to the Supreme Court (Salleh Abas L.P., Seah & Hashim Yeop A. Sani S.C.JJ.) *vide* Supreme Court Criminal Appeal No. 52 of 1984 was dismissed on August 23, 1985. The Supreme Court's decision will be reported soon.]

*Cases referred to:*

(1) *Public Prosecutor* v. *Rengasamy* [1974] 1 M.L.J. 223.
(2) *Public Prosecutor* v. *Er Ah Kiat* [1966] 1 M.L.J. 9.
(3) *R.* v. *Chokhey* A.I.R. 1937 All. 497.
(4) *Pan Kok Wah* v. *Public Prosecutor* [1966] 2 M.L.J. 141.
(5) *Public Prosecutor* v. *Ang Boon Foo* [1981] 1 M.L.J. 40.
(6) *Johnston Fear & Kingham* v. *Commonwealth* (1943) 67 C.L.R. 314.
(7) *J.W. Hinde* [1977] 64 Cr. A.R. 213.
(8) *R.* v. *Woodman* [1974] 1 Q.B. 754, 758.
(9) *Abdul Manap* v. *Public Prosecutor* [1952] M.L.J. 140.
(10) *Haw Tua Tau* v. *Public Prosecutor* [1981] 2 M.L.J. 49.
(11) *Mah Kok Cheong* v. *R.* [1953] M.L.J. 46, 47.
(12) *Tan Hung Song* v. *R.* [1951] M.L.J. 181.
(13) *Public Prosecutor* v. *Liew Sam Seong* [1982] 1 M.L.J. 223.
(14) *Ho Ming Siang* v. *Public Prosecutor* [1966] 1 M.L.J. 252, 256.
(15) *Datuk Mokhtar Hashim* v. *Public Prosecutor* [1983] 2 M.L.J. 232, 276.

CRIMINAL TRIAL.

*Miss Chua Meng Hung* (Deputy Public Prosecutor) for the Public Prosecutor.

*Hassan bin Tan Sri Ibrahim* for the accused.

*Cur. Adv. Vult.*

**Shankar J.**: Jamali bin Adnan, the Accused in this case, is on trial for his life on 2 charges under the Internal Security Act 1960.

The first charge against him is that on October 19, 1981 at about 4.50 a.m. in a small holding, off Jalan Leong Bee, Ulu Choh in the state of Johore within a security area, he had under his control, without lawful excuse, two firearms, to wit:

(a) One .38 Special Revolver No. 32 and 4/1209
(b) One home-made .38 Special Revolver

without lawful authority and that he thereby committed an offence punishable under section 57(1)(a) of the Internal Security Act 1960. The second charge against him was that at the same time and place and without lawful excuse he had under his control 29 rounds of .38 Special ammunition and 10 rounds of .38 ammunition without lawful authority and that he thereby committed an offence punishable under section 57(1)(b) of the Internal Security Act 1960.

The main prosecution witness was PW2 DSP Yeap Hooi San. He said that acting on information received in October 1981, he formed a party of police officers and detectives on October 18, 1981 and left with them from Johore Bahru for Pekan Nenas. Together with the party were two civilian suspects named Tugimin bin Adnan and Seah Ah Huat. At the Pekan Nenas Police Station they were joined by Inspector Chan Yoke Meng and his party.

From here the group proceeded to the 33rd milestone Pontian-Johore Bahru road and thence into Kampong Sri Bunian. They stopped about half a mile from the Kampong and proceeded to a certain house on foot. On arrival there the house was pointed out by Tugimin. It was surrounded and Tugimin was asked to call out to the Accused which he did. The Accused opened the door and DSP Yeap identified himself and immediately upon satisfying himself that the person who opened the door was Jamali bin Adnan I.C. 426430, he arrested the Accused. The house was searched and another male Malay was found in it named Pangat bin Kassan. This man was also taken into police custody. The party then left the house for Pontian Police Station. Here DSP Yeap made a police report (Pontian Report 3062/81).

At the Police Station, after the report was made, he says he separated Jamali bin Adnan from the other suspects and took him to a room where he interviewed the Accused assisted by Inspector Harbajan Singh and Inspector Razlan bin Abu. No caution was administered at this stage as required by section 113 of the Criminal Procedure Code or section 75 of the Internal Security Act.

In the course of this interview the police received some information, which was said to have led to the discovery of the subject matter of the two charges and consequently was sought to be admitted under section 27 of the Evidence Act 1950. What this information was, and how much of it was admissible under section 27 of the Evidence Act 1950 is an issue which is separately treated in this judgment at a later stage.

The police party was led by Jamali to Ulu Choh. At the 22nd milestone of the Pekan Nenas-Johor Bahru road he led the police party to the Leong Bee rubber plantation towards Gelang Patah for about 3 miles. Here they turned left and proceeded into an estate path for about a mile.

At this point the vehicles were stopped and the party proceeded led by Jamali to a spot about three-quarters of a mile into the fruit plantation. Once there, DSP Yeap said Jamali pointed out to a spot where he said something. DSP Yeap instructed DPC 12690 Amran bin Zamzam to take a photograph of the spot. Then on the basis of the information received from Jamali DSP Yeap requested Det./Sgt. Naidu to remove the top layer of earth. When this was done, a Dutch Baby milk tin was spotted under the ground. A photograph of this was taken also. Then the tin was opened and inside was found 2 guns submerged in lubricating oil. A photograph of this was also taken. Then DSP Yeap asked Jamali for the whereabouts of the bullets. Jamali then led him and the police party to another spot about 20 to 25 yards away and said something. After the spot was pointed out the same procedure was followed with photographs being taken at each step. Here was discovered 2 glass jars. In them was found the ammunition which is the subject matter of the second charge.

DSP Yeap took possession of all these exhibits and brought them back with him to his office in Johor Bahru. Here he made a search list of all the exhibits found and served a copy on Jamali (Ext. P29). This was not contested by the Accused. The search list in material particulars is typed out in Malay, and states that the guns and ammunition

were found in the durian plantation. The search list is purportedly signed by Jamali.

All the exhibits were marked. On October 20, 1981 DSP Yeap handed the 2 revolvers and the ammunition to ASP Pathmanathan (PW5) but he received them back at about 6.00 p.m. the same day. On November 1, 1981 he handed all the exhibits to the Investigating Officer DSP Yusof Lazim (PW1).

DSP Yeap was cross-examined at some length. There was some suggestion that force had been used against the Accused after his initial arrest on the way to Pontian Police Station and during the interview at the Pontian Police Station. This he denied. There was also some dispute as to what Jamali had actually said at the Police Station with which I shall deal with later. But as to the evidence that Jamali took DSP Yeap and his party from Pontian to Ulu Choh and thence into a fruit plantation adjoining his father's plantation and there pointed out the precise spots, DSP Yeap was unshaken.

To corroborate DSP Yeap the prosecution called Inspector Harbajan Singh (PW3). His evidence substantially corroborated the evidence of DSP Yeap in all material particulars. I therefore do not find it necessary to recapitulate his evidence in this judgment.

The next important witness is ASP Patmanathan (PW5). This witness had recorded a caution statement from Jamali on the afternoon of October 20, 1981. The admissibility of this document was challenged and therefore it became necessary to have a trial-within-a-trial at the conclusion of which I ruled that the statement had been made voluntarily and was therefore admissible in evidence because all the prerequisites that the law required had been complied with. In view of the importance of the document in this case, I think it desirable for me to set out the reasons why this document was admitted.

According to the evidence of ASP Patmanathan he received instructions at about 2 p.m. on the afternoon of October 20, 1981 to record a statement from Jamali who was then in the lock-up at the Larkin Police Station. He was brought to ASP Patmanathan by Det./Sgt. Naidu and another DPC. Once in his room, one handcuff of the Accused Jamali was removed and fastened to the chair leaving that hand free. The other hand remained handcuffed to the chair. PW5 then sent out the 2 DPCs and shut the door from inside thereby leaving him alone with Jamali. They then conversed in Malay and having satisfied himself that the Accused understood him, had no complaints, and wished to make a statement, he proceeded to administer the caution. He says that he did not induce, threaten or make any promise to the Accused in regard to the matter before him. He administered a caution to the Accused in Malay in the prescribed statutory form. He says he has a typewriter on his table and the Form Police 51C which he used to record the statement had, rubber-stamped on it, the caution in the prescribed statutory form. After administering this he asked the Accused if he understood the caution. The Accused said he did and ASP Patmanathan typed the answer "Ada". Then he asked in Malay whether Jamali wished to make a statement and he typed the answer "Saya hendak beri percakapan." Then he asked whether Jamali had been threatened, induced or offered any promise to make the statement and Jamali's reply "Tidak" was typed into the statement. The paper was then taken out of the typewriter and both Jamali and ASP Patmanathan signed the document. It was then reinserted into the typewriter and the rest of the statement which consisted of questions and answers in Malay were translated simultaneously by ASP Patmanathan into English and typed into the statement in English.

After the statement was completed and some questions were put to clarify some points arising therefrom, ASP Patmanathan read over the statement back to Jamali translating it into Malay and Jamali admitted that it was correct, that he did not wish to say anything further, and that what he stated truly represented all that he wished to say. Once again he and ASP Patmanathan signed but now on the last page at the foot of the statement. So the statement consists of 4 pages on 2 sheets of paper with the Accused's signature appearing with that of ASP Patmanathan on the front page of the first sheet and the last page of the second sheet.

The copy which was tendered in evidence was not the original but a carbon copy of the top copy. The statement had been prepared in duplicate and the second copy tendered bore the original signatures of Jamali and ASP Patmanathan. On the authority of *Public Prosecutor* v. *Rengasamy*[1] I held that this copy constituted primary evidence. The admissibility of the statement was challenged on the following grounds by the Accused who himself gave evidence.

Briefly he said when he was interviewed by ASP Patmanathan on the afternoon of October 20, 1981, ASP Patmanathan did not have any typewriter in front of him. All that happened was that they had a chat and the ASP made some handwritten notes. On the table was a typewriter which was not used throughout the interview. No caution had been administered. Whilst the conversation went on in Malay the Accused could see that ASP Patmanathan was making notes in English. The two police detectives did not leave the room. Nothing was said about any statement Jamali made being given in evidence. The revolver and the bullets were on the table. As to this he said, "I was frightened when I saw the firearms on the table. But they did not ask me to do anything."

Jamali then stated that he had not been asked to sign anything by ASP Patmanathan and that the interview had lasted only to about 3.45 p.m. contrary to ASP Patmanathan's evidence that it had gone on until about 6 p.m. Jamali says that he reached Larkin lock-up about 7 p.m. that night and on October 21 and 22 he was still in the Larkin Police Station.

On October 23 or 24 he claims to have been brought to the police depot where he saw Insp. Harbajan Singh and Insp. Chong Kow Chai. They wanted him to sign a paper. The caution statement was then shown to him and he claimed that although he did not know what the document was about and that it had never been read out to him, he signed the document in the presence of the 2 inspectors along with a number of other documents possibly 5 in all. Jamali maintained that he had never made the statement contained in the document produced by ASP Patmanathan. But then he gave the court absolutely no explanation as to why he should sign about 5 documents on October 23 and 24. There is no evidence of any force being used against him and he maintains that he did not know what he was signing.

In re-examination Jamali had stated that when he was arrested on October 19, 1981 he was not worried or frightened. Despite the events which followed he says that when he allegedly signed the documents on or about October 23 or 24, it did not cross his mind that what he was signing was calculated to link him with the arms and the ammunition which had been recovered.

The Defence called Sgt. Govindasamy to produce the station cum lock-up diary of the Larkin Police Station. This shows that Jamali was received into custody from DSP Yeap Hooi San at about 6.30 a.m. on October 19, 1981. The same day at 9.30 a.m. he was taken to the court for production. At about 10.40 a.m. he was returned to the lock-up in good condition. On October 20, 1981, he was taken out at about 2.55 p.m. He was returned at about 6.20 p.m. On October 21, he taken out at 3.40 p.m. on the instructions of DSP Yeap. He was returned to the lock-up on October 22, 1981 at 2 a.m. There are no entries for October 23 or 24, 1981. For October 25, there is an entry for 3.20 p.m. to the effect that he was taken by Insp. Zainuzzin to the Central Police Station at Johore Bahru and returned at 4.30 p.m. in good condition. These remarks were explained by Sgt. Govindasamy to mean that the prisoner was in good physical condition and showed no evidence of being assaulted.

By way of rebuttal the Prosecution called ASP Patmanathan to reiterate that the statutory requirements had been complied with and that there was no substance to Jamali's contention that the statement had not been recorded as stated on October 20, 1981. Insp. Harbajan Singh was called and he gave evidence fully corroborated by his diary that after he had escorted Jamali on October 20, 1981 he did not have anything further to do with him. The allegation that he and Insp. Chong Kow Chai had seen him and obtained Jamali's signatures on documents on or about October 23 or 24, 1981 was shown to be completely baseless. In fact Insp. Harbajan Singh had not even seen the caution statement until it was shown to him in the witness box.

In these circumstances I had no hesitation in coming to a conclusion that all the statutory requirements had been complied with, and that the statement had been voluntarily made and that it was admissible in evidence. The only point of substance in this connection was a possibility raised by the Defence that ASP Patmanathan's Malay was not adequate to a full understanding of what Jamali bin Adnan said to him in answer to his questions. I therefore required him to demonstrate on oath how he had translated the statement taking the crucial passage relating to the discovery of the weapons and the ammunition. I was satisfied in my own mind that ASP Patmanathan's knowledge of Malay was of a level which made him fully competent to understand what was said and recorded and that the Accused Jamali would also have no problems in understanding and speaking to ASP Patmanathan.

We are thus left with only the other point on the matter of the caution statement. Defence Counsel says that since Jamali bin Adnan spoke in Malay it was obligatory for ASP Patmanathan to record the statement in Malay and having failed to do so the statement should be excluded from evidence. With respect I do not agree. Whilst it would of course have been more desirable for ASP Patmanathan to record the statement in the language in which it was made, particularly as he had the necessary competence to do so, having passed his Standard 2 Malay and being fully familiar with the language, nevertheless what this court is concerned with is whether the caution statement truly represents what Jamali bin Adnan said to ASP Patmanathan.

Defence Counsel complains that the translation is inaccurate because for "senjata" the word "pistol" has been used when "senjata" could mean any weapon including even a parang or an axe. The court's response to this is that evidence should be viewed in the context in which it is given and the third page of the statement shows that the 2 pistols were in fact identified by Jamali and the latter portion of the statement where Jamali used the word "senjata" could only refer to the guns which he identified. In all the circumstances I held that the statement was voluntary, the statutory requirements had been satisfied, and consequently the document was admissible.

I also formed the view at that stage that the contentions of Jamali that the document had been signed by him under a trick or in ignorance of its contents were wholly baseless. Formal evidence was called to link the passage of the subject matter of the charge from the Investigating Officer to the Armourer and back. The guns were serviceable and the ammunition found had been test fired to show they fully complied with the requirements of the statute.

In these circumstances, at the close of the Prosecution case the only test which I had to apply was whether if unrebutted the evidence led by the Prosecution was sufficient to warrant a conviction on each charge. The crux of the charges against the Accused is whether he was in control of the arms and the ammunition at the material time. The word "control" appears to have been the subject of some difficulty in the matter of its precise application. Counsel for the Defence and the learned Deputy Public Prosecutor referred me to some previous Malaysian decisions.

*Public Prosecutor* v. *Er Ah Kiat*[2] was a case concerning a charge of having the control of a hand grenade in contravention of section 57(1)(b) of the Act. The grenade was found behind the house of the Accused buried beside a coconut tree stump. It was found there after the Accused had pointed out the spot as being the place where he had buried the grenade.

Raja Azlan Shah J. (as he then was) said at page 11:–

> "In my view, if the hand grenade was discovered in consequence of the statement it would be evidence of his control even though the hand grenade is concealed in a public place because unless he had control he would not have concealed it there."

His Lordship then proceeded to rely on *Emperor* v. *Chokhey*[3] where a gun recovered from railway premises within the railway fencing was held to be within the control of the Accused. The reasoning of the court was that the Accused had taken the precaution of burying it, and although the place was accessible to the public no member of the public could have ordinarily got at the gun in as much as it was concealed from view, whereas the Accused could have access to it at opportune moments.

*Pan Kok Wah* v. *Public Prosecutor*[4] concerned the offence of being in possession of a still. Ong Hock Thai F.J. drew a distinction between "possession" and "control". He said:–

> " 'Control', said Dickson J. (as he then was) in *Bank of New South Wales* v. *The Commonwealth* is an unfortunate word of such wide and ambiguous import that it has been taken to mean something weaker than 'restraint', something equivalent to 'regulation'. In *Dollfus Meig* v. *Bank of England* (1948) 76 C.L.R. 1, at p. 385) Somervell L.J. said that 'control would ... cover the right to tell the possessor what is to be done with the property'."

*Public Prosecutor* v. *Ang Boon Foo*[5] dealt with the possession of dangerous drugs contrary to section 12(2) of the Dangerous Drugs Ordinance. New section 37(d) of that Ordinance created a presumption that if a man has control or custody of a drug the onus of proving first that he did not have possession and secondly that he did not know the nature of the drug shall be shifted to him. In other words until the contrary is proved he is deemed to have been in possession of the drugs in question. Gunn Chit Tuan J. referred to the same decisions cited as had Ong F.J. *(ubi supra)* and also the Australian case of *Johnson Fear & Kingham* v. *Commonwealth*[6] that:–

"The word 'control' is wide enough to include many types of possession which are not commensurate with full ownership."

Ambiguity in language is anathema to the law. Precision is its touchstone for words in a criminal statute must be strictly construed since they affect the lives and the liberty of the subjects of the realm. If the words are of such wide and ambiguous import then it is the duty of the courts to put as precise a meaning on the word as is possible in the circumstances. Should Ali Baba's mere knowledge of the magic words required to open the door of the cave be taken to imply control of all the booty in it? In the *Concise Oxford Dictionary* the noun and verb "control" are defined *inter alia* as "power of directing" and "dominate" respectively. That a person cannot be in control of property which is in the physical possession of another unless he is entitled to an immediate right of possession thereto *de jure* is brought out in *J. W. Hinde.*[7] But where chattels are left or buried on land belonging to others the issue of control is a more difficult one. An owner of land may well be in control of that land by taking steps to exclude others, by fencing it in or by other means. In such a case he may be said to be *prima facie* in control of articles which are on the land. But what if a third party has concealed articles there of which the owner has no knowledge? In view of the importance of the issue it is worthwhile reproducing here the relevant portion of the judgment of Lord Widgery C.J. in *Regina* v. *Woodman*[8] ;

"The point was well put in an article written by no less a person than Mr. Wendell Holmes in his book *The Common Law* (1881), at pp. 222, 223-224, dealing with possession. Considering the very point we have to consider here, he said, and I take the extract from *Hibbert* v. *McKiernan* may think fit to call for."

> 'There can be no *animus domini* unless the thing is known of; but an intent to exclude others from it may be contained in a larger intent to exclude others from the place where it is, without any knowledge of the object's existence ... In a criminal case, the property in iron taken from the bottom of a canal by a stranger was held well laid in the canal company, although it does not appear that the company knew of it, or had any lien upon it. The only intent concerning the thing discoverable in such instances is the general intent which the occupant of land has to exclude the public from the land, and thus, as a consequence, to exclude them from what is upon it.'

So far as this case is concerned, arising as it does under the Theft Act 1968, we are content to say that there was evidence of English China Clays being in control of the site and *prima facie* in control of articles upon the site as well. The fact that it could not be shown that they were conscious of the existence of this or any particular scrap iron does not destroy the general principle that control of the site by excluding others from it is *prima facie* control of articles on the site as well.

There has been some mention in argument of what would happen if in a case like the present, a third party had come and placed some article within the barbed-wire fence and thus on the site. The article might be an article of some serious criminal consequence such as explosives or drugs. It may well be that in that type of case the fact that the article has been introduced at a late stage in circumstances in which the occupier of the site had no means of knowledge would produce a different result from that which arises under the general presumption to which we have referred, but in the present case there was, in our view, ample evidence to go to the jury on the question of whether English China Clays were in control of the scrap at the relevant time."

For myself I would hold that mere knowledge of the whereabouts of offensive material cannot be equated to control. The mere fact that A knows where B has concealed firearms is not enough to import control. There has to be something more. That something to my mind is an element of dominion over the material. It must be shown at the very least therefore that the situation where the material is placed is such that the person who had knowledge of its whereabouts had also access of it and could at any opportune moment of his choice have obtained possession of it or the capacity to direct its disposal.

Applying this test to the facts before me I held at the close of the Prosecution's case, that unrebutted, the evidence led by the Prosecution, quite apart from any specific statement made by the Accused either at the interview, or at the scene, or in his caution statement, proved beyond all reasonable doubt that the guns and ammunition were under the control of the Accused as charged. It was the Accused who took the police from Pontian to Ulu Choh (a journey of approximately 45 minutes) at the 22nd milestone Pekan Nenas-Johor Bahru road. From this point he took them a further 3 miles along an estate road leading to the Leong Bee Plantation. Then he took them along a smaller path for a further distance of about 1 mile into a kampong and from here on foot for a further ¾ of a mile into his father's small-holding. The point is that the Accused was able to zero in to the spots where the guns and ammunition were buried with all the instincts of a homing pigeon. In terms of territorial imperatives, he was in his element in the area where the guns and the ammunition were found. In all the circumstances the inference that he had dominion over the articles in question was irresistible. Unrebutted it was the only proper inference from the facts.

In calling upon the Accused to enter his defence I was also guided by decision of *Public Prosecutor* v. *Er Ah Kiat (supra)*. At the scene DSP Yeap gave evidence that at the first spot pointed out by the Accused he said, "Inilah tempat saya tanam tin susu Dutch Baby dan dalamnya ada dua puchok senjata yang boleh pusing." And at the second spot which he pointed he said, "Inilah tempat saya tanam dua botol berisi peluru." According to the case just cited these words were clearly admissible, and unrebutted, they left me in no doubt that the Prosecution had discharged the burden placed upon them.

The charges alleged that the Accused had the guns and ammunition under his control without lawful excuse and without lawful authority. *Abdul Manap* v. *Public Prosecutor*[9] is clear showing lawful excuse and authority was on the Accused.

The learned Deputy Public Prosecutor also drew my attention to *Haw Tua Tau* v. *Public Prosecutor*[10] on the stand that the court should adopt at the close of the Prosecution case. That decision by the Privy Council turns on the wording of the Criminal Procedure Code of Singapore. In calling upon the Accused to enter upon his defence I had in mind the provisions of section 180 of the Malaysian Criminal Procedure Code. The burden of proof upon the Accused has been spelt out in *Mah Kok Cheong* v. *R.*[11] Quite simply the defence must raise a reasonable doubt as to the truth of the prosecution's case or as to the Accused's guilt. The onus upon the Accused is lower than that cast upon the prosecution. En Hassan submitted that it is enough if the defence has proven its case on the balance of probabilities so that the court is prepared to hold that his version of the events could probably be true then he should be acquitted.

Now what is the case for the defence? The Accused was about 29 years old at the time of the alleged commission of the offence. He was educated up to Standard 4 in a Malay School. He is married with 3 children. After he left school he assisted his parents. In 1978 he says he went on a tour to Thailand. There he met a Thai named Phe-ie. They became friendly and exchanged addresses. The Accused gave his address as Kampong Sri Bunian, Batu 33 Jalan Johor-Pontian, Johor Bahru. That is the only address he gave Phe-ie. By 1981 the Accused was working as a rubber tapper in the small-holding of a Singapore towkay. This small-holding was at Ulu Choh. It was about 15 miles from his residence at Kampong Sri Bunian Pontian which was his mother-in-law's house. Now the Accused's father also had a small-holding at Ulu Choh off the 22nd milestone Pekan Nenas-Johor Bahru road.

The Accused's daily routine would be, to go by car with his wife to his father's smallholding. There he took his father's motor cycle and together with his wife and mother they would go to work at the Singapore towkay's smallholding about a mile away. After work he would return to his father's house. There he would have a bath, say his prayers, have lunch and return to Sri Bunian. Whenever required he would also help his father on his smallholding. When he did this he did not work on the Singapore towkay's smallholding where he was paid on a daily basis.

Between 1978 and about 2 weeks before October 19, 1981 his Thai friend Phe-ie visited the Accused 3 times. We are not told when the first 2 visits took place but one was at his brother-in-law's stall at Sri Bunian and the next in Pontian town. The last visit in early October 1981 took place in the Accused's father's smallholding. This smallholding is about 7 acres. Adjoining it is a durian plantation about 5 to 7 acres.

The Accused says that on his last visit Phe-ie suddenly turned up, out of the blue, at about 10 a.m. He came in a car. The Accused was then tapping in his father's smallholding. Phe-ie asked him if the Accused could give him a tin. The Accused replied that next to his own car there was a tin which he used for keeping water and Phe-ie could have the tin. Phe-ie then disappeared. He came back about 20 minutes later. He told the Accused that he had kept some "barang" near a durian tree. The Accused did not know what the things were and Phe-ie did not tell him. The Accused did not ask Phe-ie what the things were. The Accused further states that he did not know in what manner Phe-ie had kept the barang referred to in the durian plantation. It was not specified whether the things were kept in the tin, or whether it had been concealed, or buried under the ground. In short Phe-ie gave the Accused no particulars whatsoever as to what had been kept in the durian plantation or how it had been secreted there.

The Accused says that the entire conversation between him and Phe-ie during the 20 minutes only related to the request for the tin and the direction given by the Accused as to where the tin was to be found and thereafter the statement

by Phe-ie that he had kept something in the durian plantation. This perfunctory conversation is explained by him on the basis that the Accused was busy at the time with his work. He never saw Phe-ie again after that. He says that it did not strike him that the conduct of Phe-ie was in any way unusual.

If this evidence is taken at face value it must mean that the Accused had no knowledge as to what Phe-ie had done with the tin. His only knowledge was that Phe-ie had kept something in a durian plantation adjacent to the Accused's place of work which was about 5 to 7 acres in area.

In the early hours of October 19, 1981 the Accused says that he was awakened and arrested by a police party along with his brother-in-law Pangkat bin Kassan. His house was searched but the material found there was in no way incriminating and need not delay us here. He claims that he was assaulted outside the house and on his way to the Pontian Police Station in his car. He arrived here at 3 a.m. together with the police party which consisted also of 2 civilian suspects, his brother Tugimin bin Adnan and a Chinese friend Seah Ah Huat.

At the Police Station the 3 of them were all kept in the same room. The Accused was asked to stand with his feet apart and he was interrogated for about 45 minutes. In the course of this certain statements were made. I shall deal with this aspect of the case separately. Suffice it to say here that the Accused denies having given the police any information during this time which could have led to the discovery of the firearms and the ammunition. After interrogation the Accused says that he was taken to Ulu Choh in a police van. From the time of his arrest he had been handcuffed with his hands behind his back. He was taken to his father's plantation at Ulu Choh. There he says the only thing he pointed out to the police party was the place where Phe-ie had spoken to him a fortnight before.

From this spot the Accused says that the police party took him to another spot in the durian plantation which was about 3 chains away. It was downhill and near a swamp. Here Det. Sgt. Naidu poked around in the ground with an iron rod and after a while the rod struck something hard. Then the place was dug up and the tin was found under the ground. It was opened in the presence of the Accused and the guns were found inside the tin. After this happened the police party took him to another spot. When he reached his place he says that the ammunition had already been taken out of the sock.

The Accused is adamant that he had never seen these firearms and the ammunition before. He insists that he never at any time said that the guns and the ammunition were his.

From the scene he was taken to Larkin Police Lock-up where he arrived at about 6.00 a.m. on October 19, 1981. That morning he was produced in the Magistrate's Court. He says he did not make any complaint to the Magistrate of the alleged assaults against him because he did not know the law.

On the 20th he agrees that he was brought to ASP Patmanathan by Det. Sgt. Naidu. He denies that he made any statement to ASP Patmanathan which was recorded on a typewriter. The circumstances in which the Accused claims he signed the caution statement had already been fully covered in a trial-within-a-trial during the prosecution's case. This was conducted to determine the admissibility of the caution statement. The Accused's contention was that nothing in the caution statement represented anything which he had said. That is the case for the defence and we must now proceed to consider whether the Accused has discharged the burden of proof on him.

There is the direct evidence of the events which led to the finding of the objects and the manner in which they were found. And there is also the statement which the prosecution says the Accused made which resulted in the discovery of the articles which were admitted pursuant to section 27 of the Evidence Act. And there is the caution statement exhibit P33. With all the evidence which both parties had placed before the court the mind of the court had now to be directed to the fundamental question whether the guilt of the Accused had been proved reasonable doubt.

To take the factual evidence first, the 2 issues are whether there was a meeting between Phe-ie and the Accused in early October and whether it was Phe-ie who buried the guns and ammunition in the place where they were found. In the first instance I propose to exclude totally from my consideration the statements which have been attributed to the Accused in coming to a finding on these two matters.

It is the view of this court that the Accused's

evidence as to his alleged meeting with Phe-ie is improbable in the extreme. I am not prepared to accept that the only conversation which would take place between an overseas friend and a local resident would have been along the lines described by the Accused. Surely much more would have been said, if the meeting had in fact taken place. I am also unable to accept that the curiosity of the Accused was not aroused by the request for the tin, which to say the least was extraordinary. I am unable to accept that if a friend comes all the way from Thailand to keep something in a durian plantation in Johore the Accused would not at least have asked him what it was which was being kept. Surely it would have been more plausible, if such a meeting had actually ocurred, for Phe-ie to have asked the Accused to keep an eye on his things for him.

On the second issue I hold that in all the circumstances the Accused's evidence that he did not know what Phe-ie had kept in the durian plantation and how he had kept it there quite incredible. To say, as has been suggested by the Accused, that the police party were able to locate these items by an independent search, without any assistance from the Accused, within a space of some 40 minutes, borders upon the bizarre. To look for one Dutch Baby milk tin and 2 glass jars in 4 to 5 acres of durian plantation infested with undergrowth and near swampy ground must have been a task even more challenging than the search for the proverbial needle in a haystack. This search was made at about 4.30 a.m. and with the aid of torchlights. The melodramatic way in which the Accused alleges that Det. Sgt. Naidu poked about the area with an iron rod and chanced upon the tin, was not put to any of the prosecution witnesses in cross-examination. Further if this was how the material was discovered it is incredible that at least one of the glass jars was not shattered by the impact of Sgt. Naidu's iron rod. Thus, disregarding the statements by the Accused to the discovery of the items, I hold that there was sufficient independent evidence for this court to find that the prosecution has proved beyond reasonable doubt that it was the Accused who buried these items and it was he who led the police and assisted them to recover the same. On the evidence before me, he alone had the arms and ammunition under his control and I so find it proved against him.

I now turn my attention to the statements which were imputed to the Accused which were purportedly admitted under section 27 of the Evidence Act. In his evidence in chief DSP Yeap Hooi San PW2 said that after the Accused was arrested and in the course of his interview at the Pontian Police Station the Accused was asked where he had kept the firearms used in the robberies. After a number of questions the Accused said he had kept a firearm in the compound of his father's fruit plantation and that he would lead the police to that place and that also included the bullets. He was said to have added that they were buried in the ground. As the police party was getting ready to go to Ulu Choh the Accused said he had another gun.

After the police left with the Accused for the scene and upon arrival there the Accused is said to have pointed to a spot. He then said "This is the spot I buried a Dutch Baby milk tin containing 2 firearms." His words in Malay were, "Inilah tempat saya tanam Tin Susu Dutch Baby dan dalamnya ada 2 puchok senjata yang boleh pusing." Then he led DSP Yeap to another spot about 25 yards away pointed to it and said, "Inilah tempat saya tanam 2 botol berisi peluru."

These statements were admitted in evidence without any challenge by the Defence Counsel at the time. In cross-examination of DSP Yeap the Defence Counsel put to him that what the Accused had told DSP Yeap was that he had knowledge of a weapon being kept by his Siamese friend by the name of Phe-ie. This was denied. Defence Counsel then brought out the following. The police had asked the Accused several times where were the weapons used by the Accused in the robbery. He denied he had a weapon and then asked what would happen if he produced the weapon and DSP Yeap said he did not know as it was up to his higher-ups. Then in the end the Accused said he had the weapon and it was buried in his father's plot. DSP Yeap said he never heard the name of Phe-ie in the course of his investigation. The statement was made by the Accused just before the police party left for Ulu Choh.

As to what had happened at the scene it was put by Defence Counsel that at no time did the Accused tell DSP Yeap that the guns and the ammunition were his. To this DSP Yeap replied that on many occasions the Accused did deny that he was the owner of the gun and the ammunition but towards the end he did admit they were his. All this evidence went in without any challenge by the Defence.

Another Prosecution witness PW3 Insp. Har-

bajan Singh said in his evidence-in-chief that he was one of the team who had questioned the Accused. He said this questioning came out with the information to the effect that the Accused had a pistol which was buried in his father's durian plantation at Ulu Choh. The Accused also said he was willing to lead the police to the spot where the pistol was buried. The rest of Insp. Harbajan Singh's evidence is very similar to that of DSP Yeap.

In cross-examination it was suggested that the articles had been found by an independent search and that the Accused had not pointed out the spot. This was denied. It was not suggested to Insp. Harbajan Singh in cross-examination that the Accused had not in fact made the statements attributed to him by DSP Yeap.

At the close of the Prosecution's case Defence Counsel made a submission of no case to answer. As to section 27 of the Evidence Act it was only submitted that the court should exercise due care as to the weight to be attached to the evidence admitted. No suggestion was then made that any part of the evidence put in by the Prosecution was inadmissible. The Prosecution's reply therefore did not touch on this.

After the Defence was called and the Accused commenced to give evidence on oath he proceeded to give a detailed account of the questions which were put to him during the interrogation and the answers which he gave. This evidence was designed to establish that at no time did he tell the police that he had firearms or ammunition or that he would lead the police to the place where he buried them. Matters were sought to be brought out as to other friends of the Accused, and his relationship with Pie-ie, and his previous visits, and so on and so forth. It was at this point that the court in its anxiety to ensure that inadmissible evidence did not go in by default, invited the close attention of both the Defence Counsel and the learned Deputy Public Prosecutor to the provisions of section 113 of the Criminal Procedure Code and its impact on section 27 of the Evidence Act. Clearly no caution had been administered to the Accused after his arrest and Defence Counsel then suggested that the inadmissible answers should be struck from the record. I notified the parties that this could not be done but that any evidence which was inadmissible would be excluded from my consideration.

Defence Counsel then contented himself to obtaining general denials from the Accused that he had made any statements to DSP Yeap which might have led to the discovery of the offensive material, and the case was conducted thereafter with due regard to the statutory provisions. In their final submissions the learned Deputy Public Prosecutor and Defence Counsel have drawn my attention to the following cases which set out the limitations of section 27 of the Evidence Act:

1. *Tan Hung Song* v. *Rex*[12]
2. *Public Prosecutor* v. *Er Ah Kiat*[2]
3. *Public Prosecutor* v. *Liew Sam Seong*[13].

I had drawn the attention of Counsel to *Sarkar* on Evidence 13th Edition at page 302 with particular reference to the commentary at page 317 *et seq.* I was invited by Counsel to lay down some guidelines as to what is or is not admissible under section 27. I am in full agreement with the plethora of authority that section 27 must be strictly construed. The authorities just referred to need not be set out here *in extenso.* Suffice it to say that all concerned must be on guard to ensure that only so much of the information supplied by the Accused as distinctly relates to the discovery of the fact should be admitted.

An intolerable burden is put upon Defence Counsel who cannot cross-examine to elicit other statements made in the course of investigation which may or may not help to cast doubt on what might actually have been said. It is therefore all the more imperative that in fairness to the Accused, the greatest care is exercised in excluding doubtful material under section 27 and only admitting such material as is very clearly shown to fall within the purview of the section. Applying these tests, it would be safer to exclude everything that was said at the Pontian Police Station. Those remarks were at best general statements which may have put the police on the trail. But that is not enough. On the other hand the statements which he made at the spot where the firearms and ammunition were recovered fall so clearly within the rule that I am reinforced in my belief that they were admissible. In this context I am unable to distinguish the position here from that set out in *Public Prosecutor* v. *Er Ah Kiat (supra)* at page 11.

The last aspect of this case with which I must deal with is the caution statement Exhibit P33. In the course of the Prosecution's case I had held this document to be admissible. At the end of the trial I must still consider whether what has been

said in the statement is true. Accused says that it was concocted by the police and that on October 23 & 24, 1981 he signed the documents without knowing what it was, along with some other documents. The story of the Accused in this respect comes close to the situation which had to be dealt with by Thomson L.P. in *Ho Ming Siang* v. *Public Prosecutor*[14]. There is cogent evidence before me that Insp. Harbajan Singh did not meet the Accused again after October 20, 1981. He has been falsely accused of being a party of this alleged fabrication. I have had the opportunity of observing ASP Patmanathan under cross-examination and I am satisfied that he properly recorded the statement and complied with all the statutory requirements. There is no suggestion whatsoever even from the Accused that he was in any way assaulted or terrorised by this witness into saying what he did.

Consequently I hold that the statements made by the Accused in the caution statement exhibit P33 were in fact made by the Accused. In it there are statements by the Accused which relate to other offences which he may have committed. I disregard this evidence and exclude it totally from my consideration for the purposes of this case. The prejudicial value of that part of the caution statement far outweighs its probative value on the two charges which are the subject matter of this trial. However as to the facts with which I am immediately concerned, there is in the caution statement a most detailed description of how the Accused obtained the very guns and ammunition which are the subject matter of the charges and how he secreted it and buried it in the place where they were ultimately found. In consequence I hold that this part of the caution statement and also the statements made by the Accused at the scene lend assurance to the independent evidence that the firearms and the ammunition had been put there by the Accused person and no other, and that he was the one who had them under control.

Finally there is just one further matter I must touch upon. The Accused had called Seah Ah Huat to give evidence on his behalf to support his denial that he had made any statement relating to the discovery whilst he was being interviewed at the Pontian Police Station. The learned Deputy Public Prosecutor in her cross-examination was able to show that the witness had made a totally contradictory statement to the police from the evidence he gave on oath. The evidence in court was to the effect that sometime after 1980 the Accused had visited him at his house to ask him for a job but at no time had the Accused shown him any firearm. In his statement to the police which was put in to contradict him Seah Ah Huat said that the Accused had shown him the firearm. On the basis of this contradiction the learned Deputy Public Prosecutor applied to impeach the witness' credit and following the procedure laid down in *Datuk Mokhtar Hashim* v. *Public Prosecutor*[15] I took note of the learned Deputy Public Prosecutor's application and allowed the defence to proceed in the normal way. After the defence closed its case the learned Deputy Public Prosecutor was allowed to call Insp. Liew Guan Peng to put in the statement and he was cross-examined. My finding on a consideration of the entire evidence relevant to this aspect of the matter is that the credit of DW3 Seah Ah Huat is worthless. In any case in cross-examination he shifted his ground and claimed that he could not hear what the Accused had told the police in the course of the interview.

There is one other matter which I feel constrained to deal with even though the learned Deputy Public Prosecutor or Defence Counsel did not raise it. To sustain the charge against the Accused as a matter of law it must be shown that these offences were committed within a security area. Now it is true that under proclamation P.U. (A) 148 of 1969 the Yang Di Pertuan Agung proclaimed all areas in the Federation to be security areas. But looking at the proclamation I observe that the material words of the proclamation are "In exercise of the power conferred on us by the Internal Security Act 1960 do here proclaim all areas in the Federation to be security areas for the purposes of Part II of the said Act."

Turning now to the Internal Security Act it was observed that section 57 of the Act falls not under Part II but under Part III of the said Act which set out the special provisions in the Act relating to security areas. Part II of the Act on the other hand contains the general provisions relating to Internal Security. In the interpretation of what constitutes a "security area" in section 57 however it is my view that one must be guided by the definition in section 2 which lays down that "security area" means any area in respect of which a proclamation under section 47 is for the time being in force.

That being the case it must be left to the appellate process to decide whether there is some anomaly here which may be urged in favour of

the Accused at that stage. In consequence of the findings which I have made, I find the Accused guilty as charged on both counts. I therefore convict him on the first and the second charge.

*Convicted accordingly.*

Solicitors: *Jalil, Hassan & Partners.*

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## PUBLIC PROSECUTOR v. JANGGU BIN AWANG

**[O.Cr.J. (Abu Mansor J.) December 15, 1984]**

**[Tawau – Criminal Trial No. 8 of 1984]**

*Dangerous Drugs – Trafficking in 414.3 gm. of cannabis – Possession – Prima facie case – Rebuttal – Conviction – Mandatory death sentence – Dangerous Drugs Act, 1952 (Act 234), s. 39B(1) (a) & (2).*

The accused was charged with trafficking in 414.3 gm. of cannabis, a dangerous drug, under section 39B(1) (a) of the Dangerous Drugs Act, 1952.

The accused was found carrying a plastic bag containing something (P9) brownish and greenish wrapped up in a transparent plastic tied with a string. The chemist testified that P9 was cannabis and his evidence was accepted by the court.

**Held:** (1) accepting the evidence of PW4, PW7, and PW8, the accused was in possession of cannabis P9. The prosecution had made out a *prima facie* case against the accused which, if unrebutted, would warrant a conviction;

(2) the defence that the accused denied knowledge of P9 and that he denied carrying the bag P12 at the time of arrest had not raised a reasonable doubt on the prosecution case;

(3) the accused was accordingly convicted of the offence charged and sentenced to death as required by law.

[*Editorial note:* The accused filed his appeal to the Supreme Court on December 22, 1984.]

CRIMINAL TRIAL.

*Abdul Malik b. Hji. Ishak* (Deputy Public Prosecutor) for Public Prosecutor.

*Ting E. Hang* (assigned) for the accused.

*Cur. Adv. Vult.*

**Abu Mansor J.** : The accused was convicted and sentenced to death at Tawau High Court, Sabah, on December 15, 1984, on a charge of trafficking as follows:-

"That you on 18.11.83 at about 6.45 a.m. at Pengkalan Kunak, Kunak, in the District of Lahad Datu, in the State of Sabah, did traffic in dangerous drugs, to wit, 414.3 grammes of cannabis on your own behalf and that you have thereby contravened Section 39(1) (a) of the Dangerous Drugs Act, 1952 (Revised 1980), Act 234, and punishable under section 39B(2) of the said Act."

The Prosecution called 10 witnesses and at the end of which I found as a fact that possession by the accused of the 414.3 grammes of the offending cannabis was proved. This was particularly through the evidence of prosecution witness, Sub. Insp. Rashidin Badardin (PW.6), PC Malcolm a/k Maing (PW.7) and PC Richard Laman (PW.8). PW.6 stated that on November 18, 1983 at 5.30 a.m. on information received, he proceeded to Pengkalan Kunak in civilian clothes but armed. He met two Police Field Force personnel on duty there, PW.7 and PW.8, who were then on special duty at the Kunak jetty. PW.6 briefed these two police personnel, PW.7 and PW8, to the effect that two male suspects would pass between a coffee shop and the fish market. One of the two was bearded wearing a long sleeved light blue shirt. PW.6 said that the said one with the long sleeved shirt would be carrying a plastic bag suspected to be containing "ganja". Apart from this, PW.6 also gave the description of the other person who was younger and he would be carrying a travelling bag of clothes. PW.6 then asked PW.7 and PW.8 to take ambush positions in the middle of stalls which had no walls. PW.6 positioned himself near the fish market with PW.7 on his right and PW.8 on his left. They were about 20 feet from one another and within sight. According to PW.6 from information received the two suspects would be coming from the direction of the kampong houses. At about 6.45 a.m. on November 18, 1983 as expected the two persons appeared walking one behind the other. They were walking between the fish market and the said coffee shop. PW.6 saw the bearded man was wearing a light blue shirt carrying a plastic bag behind his back (demonstrated). The person behind him was carrying a travelling bag in his left hand.

Upon seeing this, PW.6 then signalled to PW.7 and PW.8 by pointing his fingers towards them. When PW.6 followed PW.7 from behind PW.7 and PW.8 closed in. While so following PW.6 saw the bearded man was still carrying the plastic bag. PW.6 saw PW.7 held the bearded man's right hand from the back and brought him to a squatting position (demonstrated). PW.7 took the plastic